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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 FABIAN GODINEZ-OSEGUERA,

12 Defendant.

CASE NO. CR11-5545BHS

ORDER GRANTING IN PART  
AND DENYING IN PART  
GOVERNMENT'S MOTION IN  
LIMINE TO PRECLUDE DURESS  
DEFENSE

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14 This matter comes before the Court on the Government's motion in limine to  
15 preclude duress defense (Dkt. 20). The Court has considered the pleadings filed in  
16 support of, and in opposition to, the motion and the remainder of the file. For the reasons  
17 stated herein, the Court hereby grants in part and denies in part the motion.

18 **I. PROCEDURAL HISTORY**

19 On December 8, 2011, a grand jury indicted Defendant Fabian Godinez-Oseguera,  
20 charging him with Illegal Entry After Deportation, in violation of Title 8, United States  
21 Code, Section 1326(a). On December 29, 2011, the Government filed a motion in limine  
22 to preclude any duress defense, and, on January 6, 2012, the Government filed supporting

1 memorandum. Dkt. 20. On February 2, 2012, Defendant responded. Dkt. 30. On  
2 February 6, 2012, the Government replied. Dkt. 31. On February 8, 2012, the Court  
3 heard oral argument on the motion. Dkt. 32.

## 4 **II. FACTUAL BACKGROUND**

### 5 **A. Defendant's Background**

6 Defendant is a 35-year-old citizen and national of Mexico who, during his time in  
7 the United States, has been convicted of: (1) alien carry/possession of firearm without  
8 license, malicious mischief, and driving with suspended license (2004 Grant County  
9 Superior Court); (2) controlled substance without prescription and driving under the  
10 influence (2007 Kitsap County Superior Court); delivery of methamphetamine and  
11 unlawful possession of a firearm (2008 Kitsap County Superior Court); witness  
12 tampering and fourth-degree assault (2011 Kitsap County Superior Court); and  
13 possession of controlled substance without prescription (2011 Grant County Superior  
14 Court). Dkt. 23 at 2.

### 15 **B. Deportations**

16 The United States has deported Defendant four times – in 2000, 2004, 2007, and  
17 2010. *Id.* After his last deportation on October 23, 2010, Defendant re-entered the  
18 United States for a fifth time on October 31, 2010. *Id.* On November 29, 2010, an  
19 Immigration and Customs Enforcement (ICE) agent found Defendant in the Kitsap  
20 County Jail where he was in custody on charges of witness tampering and fourth-degree  
21 assault. *Id.* He was later convicted on the charges, and, on April 26, 2011, he was  
22 sentenced to nine months in prison. *Id.* at 5. After serving his prison term, Defendant

1 was transferred to the Grant County Jail where, on October 18, 2011, he entered a guilty  
2 plea in connection with possession of a controlled substance without prescription. *Id.* On  
3 October 20, 2011, Defendant was released to ICE custody. *Id.*

4 **C. Duress Defense**

5 Defendant claims that he re-entered the United States due to two immediate threats  
6 in Mexico. First, he maintains that he was beaten and robbed by Mexican police in  
7 Tijuana after his October 23, 2010 deportation. *Id.* at 6-7. He claims that he reported the  
8 incident to a local human rights organization, but that he was unable to pursue the matter  
9 after Mexican police, who had learned of the report, intimidated him. *Id.* Namely,  
10 Defendant claims that two men with knives chased him and threatened to make  
11 “mincemeat” of him if he pursued his complaint. *Id.* at 7.

12 Second, Defendant claims that he faced threats from the Zetas drug cartel.  
13 Namely, Defendant maintains that, after the Tijuana incident, he contacted his mother to  
14 inform her about what had happened and to tell her that he intended to return south to his  
15 hometown of Michoacan. *Id.*; Dkt. 30 at 6. Defendant claims that his mother begged  
16 him not to go home. *Id.* Specifically, Defendant contends that his mother told him that  
17 his brother, Daniel, had been coerced into helping the Zetas drug cartel; that one of  
18 Daniel’s friends had been brutally murdered for not cooperating with the Zetas; and that  
19 the Zetas had posted a written notice on his family’s home threatening to kill anyone who  
20 turned up there. *Id.* Defendant argues that because he had nowhere to run in Mexico, his  
21 family paid for a coyote to bring him across the U.S. border once again. *Id.* at 6.  
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1 After crossing the border, Defendant did not turn himself into U.S. authorities  
2 because, according to him, “they would have arrested [and deported] me.” *Id.* at 6-7.  
3 Defendant does claim, however, that he sought help from the Mexican consulate. *Id.* at 6.

### 4 **III. DISCUSSION**

5 Defendant concedes that his re-entry into the United States was illegal, but argues  
6 that it was necessitated by the “torture[]” that he endured in Mexico and his fear of the  
7 police and Zetas. *Id.* In essence, Defendant claims that he faced two threats. The first  
8 threat arises from the beating and the follow-up intimidation that he purportedly sustained  
9 at the hands of the Mexican police. The second threat relates to the Zetas.

10 In a Section 1326(a) prosecution involving duress, a defendant must make a prima  
11 facie showing of duress in a pre-trial offer of proof. *See United States v. Ibarra-Pino*,  
12 657 F.3d 1000, 1004 (9th Cir. 2011). To present a duress defense, a defendant must  
13 establish by a preponderance of the evidence (1) an immediate threat of death or serious  
14 bodily injury; (2) a well-grounded fear that the threat will be carried out; and (3) lack of a  
15 reasonable opportunity to escape the threatened harm.” *Id.* Here, the Government does  
16 not contest the second element – that the Defendant had a well-grounded fear that the  
17 threat will be carried out. Dkt. 23 at 13. Instead, the Government contends that  
18 Defendant cannot establish a prima facie showing on the first and third elements. *Id.*

19 Having reviewed the record, the Court will allow Defendant to submit a duress  
20 defense in connection with his claim that the Mexican police, or those working for them,  
21 beat him and threatened to make “mincemeat” out of him if he did not drop his complaint  
22 to the local human rights organization. Although the Court shares the Government’s

1 concern regarding whether or not Defendant had a reasonable opportunity to escape that  
2 particular threat, the Court defers to the principle that “fact-finding is usually a function  
3 of the jury,” which requires a trial court to generally refrain from ruling on defenses as a  
4 matter of law. *United States v. Kuok*, 2012 WL 118571, at \*13 (9th Cir. Jan. 17, 2012).  
5 Indeed, the instant threat is noteworthy and distinguishable in that it purportedly caused  
6 Defendant to abstain from exercising a right (i.e., pursuing a complaint with the human  
7 rights commission), as opposed to forcibly causing Defendant to commit an affirmative  
8 act against his wishes. Nonetheless, taking Defendant’s proffer as true, as it must, the  
9 Court finds that Defendant is entitled to present the circumstances of this Tijuana-based  
10 threat to a jury. Accordingly, the Court denies the Government’s motion to preclude a  
11 duress defense based on the above-explained threatened harm.

12 By contrast, the Court will *not* allow Defendant to present a duress defense that  
13 stems from his fear of the Zetas. To be immediate, a threat must be specific. *See Kuok*,  
14 2012 WL 118571, at \*14 (“[a] veiled threat of future unspecified harm” is not sufficient  
15 (citations omitted)); *see also United States v. Contento-Pachon*, 723 F.2d 691, 694 (9th  
16 Cir. 1984).<sup>1</sup> Although the Court acknowledges that drug cartels and gang violence are

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18 <sup>1</sup> With respect to the first element, the Ninth Circuit has explained:

19 To establish the element of immediacy, a defendant must make a prima  
20 facie showing that the defendant completed the illegal action under a threat of  
21 immediate harm to the defendant. Under this test, the threat to the defendant or  
22 the defendant’s family must be present, immediate or impending . . . such that the  
defendant’s persecutors figuratively held a gun to his head . . . compelling the  
defendant to commit the illegal action. . . . A threat raising the possibility of  
action after thirty days does not meet the requirements of immediacy.

*United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008) (citations omitted).

1 pervasive in Mexico, and that Defendant’s family was purportedly impacted by that  
2 violence, the Court finds that Defendant’s fear of Zetas is based ultimately on a  
3 speculative threat that does not appear specifically directed at Defendant. *See United*  
4 *States v. Becerra*, 992 F.2d 960, 964 (9th Cir. 1993) (rejecting a duress defense where the  
5 threat to “take care” of defendant’s family did not include a specific time frame, and  
6 lacked detail). To allow a duress defense on these facts would render permissible any  
7 and all duress defenses on the mere showing that an illegal alien arrived from a land  
8 grappling with systemic violence. That cannot be the case. Moreover, while affording  
9 the defense the right to present their case to a jury, the Court must guard against the  
10 potentially confusing introduction of highly-charged testimony from a country conditions  
11 expert regarding the “real and rampant” threats in Mexico. Dkt. 30 at 12. Because the  
12 Court finds that the threatened harm relating to the Zetas was not immediate, the Court  
13 grants the Government’s motion to preclude Defendant from introducing the related  
14 duress defense at trial.<sup>2</sup>

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21 <sup>2</sup> Because the Court precludes the duress defense with respect to the Zetas threat, the  
22 Court need not decide whether or not Defendant has established the third element – i.e., whether  
he had a reasonable opportunity to escape the threatened harm.

1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that the Government's motion in limine to  
3 preclude duress defense is **GRANTED IN PART** and **DENIED IN PART** as specified.

4 Dated this 8<sup>th</sup> day of March, 2012.

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7 BENJAMIN H. SETTLE  
United States District Judge  
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